

MIGUEL MÁRQUEZ, County Counsel (S.B. #184621)  
MELISSA R. KINIYALOCTS, Deputy County Counsel (S.B. #215814)  
OFFICE OF THE COUNTY COUNSEL  
70 West Hedding, East Wing, 9<sup>th</sup> Floor  
San Jose, California 95110-1770  
Telephone: (408) 299-5900  
Facsimile: (408) 292-7240

Attorneys for Defendants  
SHERIFF LAURIE SMITH and COUNTY  
OF SANTA CLARA

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
(San Jose)

TOM SCOCCA, MADISON SOCIETY, ) No. CV11-01318  
INC., and THE CALGUNS )  
FOUNDATION, INC., )  
Plaintiffs, )  
v. )  
SHERIFF LAURIE SMITH (In her ) Date: August 12, 2011  
individual and official capacity.), ) Time: 9:00 a.m.  
COUNTY OF SANTA CLARA, and ) Dept.: 3  
DOES 1 to 20, ) Judge: Jeremy D. Fogel  
Defendants. )

**TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on **August 12, 2011** at **9:00 a.m.** before the Honorable

Jeremy D. Fogel, District Judge of the United States District Court, 280 South First Street, San Jose, California, Defendants Sheriff Laurie Smith and County of Santa Clara will and hereby do move this Court to dismiss Plaintiffs' complaint. The motion to dismiss is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This motion is based on this Notice of Motion and Motion to Dismiss Plaintiffs' Complaint, the Memorandum of Points and Authorities in Support of the Motion, the Request of Judicial Notice, and such other further oral and documentary evidence and legal memoranda as

1 may be presented at the hearing on this motion.

2 Dated: May 27, 2011

3 Respectfully submitted,

4 MIGUEL MÁRQUEZ  
County Counsel

5 By: /S/  
6 MELISSA R. KINIYALOCTS  
Deputy County Counsel

7 Attorneys for Defendants  
8 SHERIFF LAURIE SMITH and  
9 COUNTY OF SANTA CLARA

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# MEMORANDUM OF POINTS AND AUTHORITIES

I.

## INTRODUCTION

Plaintiff Tom Scocca alleges that he is a resident of Santa Clara County and that he applied for a permit to carry a concealed firearm but that Defendant Sheriff Laurie Smith denied his application. Scocca alleges that he met all of the requirements under California Penal Code section 12050, *et seq.*, to receive a permit to carry a concealed weapon and was similarly situated to other applicants who were granted such permits by the Sheriff. Scocca contends that the Sheriff administers the statutes in a way that violates his equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, section 7 of the California Constitution. He sues the Sheriff and County for alleged violations of 42 U.S.C. § 1983 and California Civil Code section 52.3.

Plaintiff Madison Society, Inc., alleges it is a membership organization whose purpose is to preserve and protect the legal and constitutional right to bear arms for its members and law-abiding citizens. Plaintiff Calguns Foundation, Inc., alleges it is a non-profit organization that seeks to promote education for all stakeholders about firearm laws and to defend the civil rights of California gun owners. These two organizations (“Plaintiff Associations”) bring the same causes of action as Scocca on behalf of themselves and their supporters.

The Complaint should be dismissed for several reasons. First, as a matter of law Scocca cannot establish that he suffered a constitutional deprivation. Recent federal cases have held that only regulations that substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment and there is no constitutional right to carry a concealed weapon. See *Nordyke v. King*, 2011 WL 1632063 (9<sup>th</sup> Cir. May 2, 2011); *Richards v. Prieto*, 2:09-CV-01235 (E.D. Cal. May 16, 2011).

Second, Plaintiff Associations do not have standing to sue. Specifically they do not have standing to sue on their own behalf because they have not alleged any facts to meet the injury requirement of standing. And Plaintiff Associations do not have standing to sue on behalf of their members because: (a) they have not identified any individual member who would have

1 standing to sue in his or her own right; and (b) the claim asserted and the relief requested would  
 2 require the participation of an individual member in this lawsuit.

3 Third, Plaintiffs' second claim for violation of California Civil Code section 52.3 should  
 4 be dismissed because there is no private right of action to enforce the statute; only the Attorney  
 5 General may bring a claim pursuant to the statute. Accordingly, Defendants' motion to dismiss  
 6 should be granted.

7 **II.**

8 **PLAINTIFFS' ALLEGATIONS**

9 Scocca contends that on December 22, 2008, he sent the Sheriff an application for a  
 10 permit to carry a concealed weapon, and that on April 14, 2009, the Sheriff denied the  
 11 application. (Complaint ¶ 26.) Scocca alleges that he is a law-abiding citizen who possesses  
 12 "good moral character" and has "good cause" to carry a concealed weapon pursuant to  
 13 California Penal Code section 12050, *et seq.*<sup>1</sup> (Id. ¶¶ 29-32.)

14 Specifically, Scocca alleges that he has a private investigator's license, owns a private  
 15 investigation firm, and is the Director of Security Risk Management at a large semiconductor  
 16 equipment manufacturer with responsibilities that allegedly include overseeing the security of  
 17 millions of dollars of trade secrets and computer equipment and conducting surveillance of  
 18 suspicious activity. (Complaint ¶ 31.) Scocca contends that even though he has a license to  
 19 openly carry a loaded firearm during the course and scope of his business, it is of "marginal  
 20 utility" when conducting surveillance of suspicious activity. (*Id.*) Scocca further contends that  
 21 he is similarly situated to "many" of the more than 70 residents of the County who allegedly  
 22 have been issued permits by the Sheriff to carry concealed firearms. (*Id.* ¶ 36.)

23 Plaintiff Associations do not assert any factual allegations that they have been harmed but  
 24 instead merely allege that they bring this action behalf of themselves and their supporters.  
 25 (Complaint ¶¶ 5-6.)

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27 <sup>1</sup> Section 12050 provides in part that "[t]he sheriff of a county, upon proof that the person applying  
 28 is of good moral character, that good cause exists for the issuance . . . may issue to that person a  
 license to carry a pistol, revolver, or other firearm capable of being concealed upon the person."

1 Plaintiffs' first claim is pursuant to 42 U.S.C. § 1983 and their second claim is pursuant to  
 2 Civil Code section 52.3; both claims are based on the Sheriff's alleged deprivation of Scocca's  
 3 right to equal protection under the United States and California Constitutions. (Complaint ¶¶  
 4 35-44.)

5 **III.**

6 **STANDARD OF REVIEW**

7 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the  
 8 legal sufficiency of the pleadings. A court may dismiss a complaint as a matter of law for: (1)  
 9 lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal claim.

10 *SmileCare Dental Group v. Delta Dental Plan of California*, 88 F.3d 780, 783 (9<sup>th</sup> Cir. 1996).  
 11 A court only reviews the contents of the complaint, accepting all factual allegations as true, and  
 12 drawing all reasonable inferences in favor of the nonmoving party. *al-Kidd v. Ashcroft*, 580  
 13 F.3d 949, 956 (9<sup>th</sup> Cir. 2009).

14 Further, a court need not accept "legal conclusions" as true. *Ashcroft v. Iqbal*, 129 U.S.  
 15 S.Ct. 1937, 1949-50 (2009). "Threadbare recitals" of the elements of a cause of action,  
 16 supported by mere conclusory statements, will not suffice to survive a motion to dismiss. *Id.* at  
 17 1949. It is also improper for a court to assume that the plaintiff can prove facts that he or she  
 18 has not alleged. *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459  
 19 U.S. 519, 526 (1983). A plaintiff therefore bears the burden of alleging sufficient factual matter  
 20 to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949  
 21 (2009).

22 **IV.**

23 **ARGUMENT**

24 **A. SCOCCA CANNOT ESTABLISH THAT THE DENIAL OF HIS APPLICATION  
 25 FOR A CONCEALED-WEAPONS PERMIT CONSTITUTED A DEPRIVATION  
 26 OF HIS CONSTITUTIONAL RIGHTS**

27 1. Heightened scrutiny does not apply unless a regulation substantially burdens the  
right to keep and to bear arms for self-defense.

28 In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court

1 held that the Second Amendment protects an individual's right to keep and bear arms for self-  
 2 defense. *Heller* distinguished the blanket handgun ban at issue in that case from apparently  
 3 permissible gun-control regulations by examining the extent to which each law burdened the  
 4 core right to armed self-defense. *Id.* at 628. *Heller* determined that the District of Columbia's  
 5 requirement that firearms in the home be kept inoperable made "it impossible for citizens to use  
 6 [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630.

7 In *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), the United States Supreme Court held  
 8 that the Second Amendment right to keep and bear arms is incorporated against the states  
 9 through the Due Process Clause of the Fourteenth Amendment.

10 Neither *Heller* nor *McDonald* articulated a standard of review in Second Amendment  
 11 cases, but the United States Court of Appeals for the Ninth Circuit recently held that only  
 12 regulations that substantially burden the right to keep and bear arms trigger heightened scrutiny  
 13 under the Second Amendment. *Nordyke v. King*, 2011 WL 1632063 at \*6. *Nordyke* reasoned  
 14 that "applying strict scrutiny to every gun-control regulation would be inconsistent with  
 15 *Heller*'s reasoning" because it "would require courts to assess the effectiveness of a myriad of  
 16 gun-control laws." *Id.* at \*4-5. Because the government's general interest in preventing crime  
 17 is a compelling interest, the question would be whether the regulation is narrowly tailored to  
 18 that interest. *Id.* at \*5. "But courts cannot determine whether a gun-control regulation is  
 19 narrowly tailored to the prevention of crime without deciding whether the regulation is likely to  
 20 be effective . . . . Sorting gun-control regulations based on their likely effectiveness is a task  
 21 better fit for the legislature." *Id.*

22 When deciding whether a restriction on guns substantially burdens Second Amendment  
 23 rights, courts are to determine whether the restriction leaves law-abiding citizens with  
 24 reasonable alternative means for obtaining firearms sufficient for self-defense. *Nordyke*, 2011  
 25 WL 1632063 at \*7. A law does not substantially burden a constitutional right simply because it  
 26 makes the right more expensive or more difficult to exercise. *Id.* at 8.

27 Two recent district court cases have considered challenges to concealed-weapons  
 28 restrictions and provide guidance in this area. In *Peruta v. County of San Diego*, 2010 WL

1 53137 (S.D. Cal. December 10, 2010),<sup>2</sup> plaintiffs alleged that the “good cause” requirement  
 2 under Penal Code section 12050 violated their right to bear arms under the Second Amendment.  
 3 The *Peruta* court distinguished concealed-weapons restrictions from those at issue in *Heller*,  
 4 which banned handgun possession in the home and required firearms to be kept inoperable at all  
 5 times. *Id.* at \*6. Unlike the restrictions in *Heller*, California permits carrying loaded firearms  
 6 for self-defense and defense of the home. *Id.* at \*5 (citing Cal. Penal Code §§ 12031(j)(1)-(2)).  
 7 The *Peruta* court concluded that “the government has an important interest in reducing the  
 8 number of concealed weapons in public in order to reduce the risks to other members of the  
 9 public” and upheld the sheriff’s requirement that applicants for concealed-weapons permits  
 10 distinguish themselves from other members of the general public by establishing that they were  
 11 placed in harm’s way. *Id.* at \*8.

12 And in *Richards v. County of Yolo*, Case No. 09-CV-01235 (E.D. Cal. May 16, 2011),<sup>3</sup>  
 13 plaintiffs challenged a sheriff’s interpretation of Penal Code section 12050; specifically, that  
 14 applicants demonstrate that they have a valid reason to request a concealed-weapons permit,  
 15 such as credible threats of violence or being a business owner who carries large sums of cash.  
 16 *Id.* at 3:9-16. The court held that regulation of concealed firearms is an essential part of  
 17 maintaining public safety and preventing crime and that the county’s implementation of Section  
 18 12050 was rationally related to these legitimate government goals. *Id.* at 10:15-21.

19 2. The Sheriff’s denial of Scocca’s application for a concealed-weapons permit did not  
substantially burden his right to keep and bear arms.

20 Scocca admits that he has a license to openly carry a loaded firearm during the course and  
 21 scope of his business. (Complaint ¶ 31.) He contends that this is of “marginal utility” when  
 22 conducting surveillance of suspicious activity. (*Id.*) Scocca does not provide any allegations to  
 23 support his contention that his license to openly carry a loaded firearm when conducting  
 24 surveillance is of marginal utility. Regardless, these allegations fail to state a constitutional  
 25

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26 <sup>2</sup> The case is presently on appeal before the Ninth Circuit. *Peruta v. County of San Diego*, Docket  
 27 No. 10-56971.

28 <sup>3</sup> Plaintiffs have appealed the decision. Request for Judicial Notice (RJN) at Exhibits A and B.

1 violation as a matter of law.

2 Scocca does not allege that he wishes to carry a concealed weapon for self-defense or  
 3 defense of his home. Nor does he allege that he carries large sums of cash in the course of his  
 4 business such that he would need a concealed weapon to protect his property. At best he  
 5 vaguely alleges a hindrance in conducting surveillance of suspicious activity in the course and  
 6 scope of his job as a private investigator who oversees security of trade secrets and computer  
 7 equipment. (Complaint ¶ 31.) As a matter of law this cannot constitute a substantial burden on  
 8 Scocca's right to keep and bear arms, particularly in light of the fact that Scocca already has a  
 9 license to openly carry a loaded firearm.

10 Since there is no substantial burden on Scocca's right to keep and bear arms, rational-basis  
 11 review applies. *Nordyke*, 2011 WL 1632063 at \*6 ("in a variety of contexts the [United States  
 12 Supreme] Court applies mere rational basis scrutiny to laws that regulate, but do not  
 13 significantly burden, fundamental rights"). The Sheriff's denial of Scocca's application for a  
 14 concealed-weapons permit was reasonably related to the legitimate government interest in  
 15 maintaining public safety and preventing crime. Scocca is still able to openly carry a loaded  
 16 firearm in the course of his duties as a private investigator and is not prohibited under California  
 17 law from using a firearm in self-defense or to protect his home. The denial of Scocca's  
 18 application to carry a concealed weapon did not substantially burden his right to keep and bear  
 19 arms but merely limited his ability to conduct some of his business functions as he would  
 20 prefer.

21 3. The Sheriff's denial of Scocca's application for a concealed-weapons permit did not  
violate his right to Equal Protection.

22 Where a statute does not "purposefully operate to the detriment of a suspect class, the only  
 23 requirement of equal protection is that [the statute] be rationally related to a legitimate  
 24 governmental interest." *Nordyke*, 2011 WL 1632063 at \*14; *Romer v. Evans*, 517 U.S. 620, 631  
 25 (1996) (courts will uphold a legislative classification so long as it neither burdens a fundamental  
 26 right nor targets a suspect class and bears a rational relation to some legitimate end). Gun  
 27 owners are not members of a suspect class. *Nordyke*, 2011 WL 1632063 at \*14.

1           Here, Scocca's equal-protection claim fails because the provisions of Penal Code section  
 2 12050 *et seq.* grant the Sheriff discretion to grant or deny applications for concealed weapons  
 3 permits if applicants do not have "good moral character" or "good cause" for such permits. Not  
 4 all applicants are similarly situated and not all can demonstrate that they are of good moral  
 5 character and have good cause for a concealed-weapons permit. Scocca's application was  
 6 obviously lacking good cause because he was not seeking a permit to protect himself or his  
 7 property. Rather, he sought the privilege of carrying a concealed weapon to improve his  
 8 business prospects by purportedly being able to more effectively conduct surveillance than he  
 9 could with the gun he was already licensed to openly carry. The Sheriff's denial of Scocca's  
 10 application for a concealed-weapons permit was reasonably related to the legitimate  
 11 government interest in maintaining public safety, preventing crime, and ensuring that concealed  
 12 weapons permits are granted to those individuals who need them for self-protection and  
 13 protection of personal property. As such, the denial did not violate Scocca's right to equal  
 14 protection. Accordingly, Scocca's complaint should be dismissed.

15           **B. PLAINTIFF ASSOCIATIONS SHOULD BE DISMISSED BECAUSE THEY DO  
 16 NOT HAVE STANDING**

17           1. Organizational plaintiffs must satisfy standing requirements to sue.

18           It is well established that federal courts cannot entertain the claims of a litigant unless that  
 19 party has demonstrated that it meets the threshold jurisdictional requirement to have  
 20 constitutional and prudential standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560  
 21 (1992). To satisfy the constitutional requirements of standing plaintiffs must show that: (1) they  
 22 have suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual or  
 23 imminent and not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's  
 24 challenged action; and (3) it is likely, as opposed to merely speculative, that the injury will be  
 25 redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528  
 26 U.S. 167, 181 (2000); *Lujan*, 504 U.S. at 560. These requirements of injury in fact, causation,  
 27 and redressability are also used to determine whether an organizational plaintiff has standing in  
 28 a particular case. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

1       2. Plaintiff Associations do not have standing to sue on their own behalf.

2       An organization suing on its own behalf can establish an injury when it suffered “both a  
 3 diversion of its resources and a frustration of its mission” as a result of the challenged conduct.  
 4 *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9<sup>th</sup>  
 5 Cir. 2010). The injury to the organization’s activities must be concrete and demonstrable – with  
 6 a consequent drain on the organization’s resources – constituting more than a simple setback to  
 7 the organization’s abstract social interests. *Environmental Protection Information Center v.*  
 8 *Pacific Lumber Co.*, 469 F.Supp.2d 803, 813 (N.D. Cal. 2007). An organization cannot  
 9 manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a  
 10 problem that otherwise would not affect the organization at all. *La Asociacion de Trabajadores*,  
 11 624 F.3d at 1088. Instead, an organization must show that it would have suffered some other  
 12 injury if it had not diverted resources to counteracting the problem. *Id.*; *See also Havens*, 455  
 13 U.S. at 379.

14       Here, Plaintiff Associations have not alleged any facts to show that they have suffered  
 15 injury to themselves. The Complaint asserts only that their general purpose is to preserve and  
 16 promote the legal rights of California gun owners. (Complaint ¶¶ 5-6.) There are no allegations  
 17 that Plaintiff Associations have suffered or will suffer a diversion of resources or a frustration of  
 18 their mission as a result of the challenged conduct. Absent a showing that they were forced or  
 19 will be forced to divert resources in order to counteract a problem caused by Defendant’s  
 20 conduct, Plaintiff Associations do not have standing to sue on their own behalf. Because  
 21 Plaintiff Associations have not alleged that they have suffered an injury, the motion to dismiss  
 22 them from this action should be granted.

23       3. Plaintiff Associations do not have standing to sue in a representative capacity.

24       If the organization has not suffered injury to itself, it may still have standing to sue on  
 25 behalf of its members if: (1) at least one of its members would otherwise have standing to sue  
 26 in his own right; (2) the interests it seeks to protect are germane to the organization’s purpose;  
 27 and (3) neither the claim asserted nor the relief requested requires the participation of individual  
 28 members in the lawsuit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S.

1 333, 343 (1977).

2 Here, although Plaintiff Associations arguably meet the second prong of the *Hunt* test,  
 3 they fail to meet the first and third prongs. As to the first prong, the Complaint does not allege  
 4 that Scocca is a member of either of the associations, nor does it allege that any other member  
 5 of the associations would otherwise meet the standing requirements to sue in his own right. The  
 6 Complaint merely states that the associations bring this action on behalf of themselves and their  
 7 supporters. Plaintiff Associations do not identify an individual who: (a) qualifies as a  
 8 “member” of either of the associations; or (b) satisfies the three constitutional requirements of  
 9 standing (i.e., injury in fact, causation, and redressability). (Complaint ¶¶ 5-6.) Absent an  
 10 allegation that at least one of its members would have standing, Plaintiff Associations cannot  
 11 sue in a representative capacity.

12 As to the third prong, both the claims asserted and the relief requested by Plaintiff  
 13 Associations would require the participation of an individual member. First, Plaintiffs allege  
 14 that the Sheriff interprets the “good moral character” and “good cause” provisions of California  
 15 Penal Code section 12050 “too narrowly for some applicants and too broadly for others,  
 16 resulting in a denial of equal protection of the law with respect to the regulation of a  
 17 fundamental right.” (Complaint ¶ 23.) To establish their equal-protection claim, Plaintiffs need  
 18 to conduct an individualized review of the Sheriff’s discretion in granting and denying permits  
 19 to carry concealed weapons. The equal-protection claim does not challenge a blanket policy or  
 20 a statute that is facially discriminatory against Plaintiff Associations’ members or supporters.  
 21 Nor does the equal-protection claim involve a statute that can be evenly applied to all  
 22 individuals who are governed by the statute’s provisions. Rather, the equal-protection claim  
 23 involves the Sheriff’s implementation of Section 12050, which is based on the discretion the  
 24 statute expressly vests with the Sheriff. As such, Plaintiff Associations’ equal-protection claim  
 25 requires the participation of a member who was denied a permit to carry a concealed weapon by  
 26 The Sheriff and was similarly situated to applicants who were granted such a permit by the  
 27 Sheriff.

28 //

1           Second, Plaintiff Associations fail the third prong of the *Hunt* test because they seek  
 2 compensatory damages, which would also require individualized proof. Federal courts have  
 3 consistently denied associations standing to seek monetary relief, which would require  
 4 individual members to participate at the proof-of-damages stage, thereby requiring individual  
 5 participation in the lawsuit. *United Union of Roofers v. Insurance Corporation of America*, 919  
 6 F.2d 1398, 1400 (9th Cir. 1990).

7           Plaintiff Associations do not have standing to sue on their own behalf and do not have  
 8 standing to sue in a representative capacity. Accordingly, Plaintiff Associations should be  
 9 dismissed from this action.

10           **C. PLAINTIFFS' CLAIM FOR RELIEF UNDER CALIFORNIA CIVIL CODE  
 11 SECTION 52.3 SHOULD BE DISMISSED BECAUSE THAT CODE SECTION  
 12 DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION**

13           California Civil Code section 52.3 is a state civil-rights statute, which provides that:

- 14           (a) No governmental authority, or agent of a governmental authority, or person  
                   acting on behalf of a governmental authority, shall engage in a pattern or  
                   practice of conduct by law enforcement officers that deprives any person of  
                   rights, privileges, or immunities secured or protected by the Constitution or  
                   laws of the United States or by the Constitution or laws of California.
- 15           (b) The Attorney General may bring a civil action in the name of the people to  
                   obtain appropriate equitable and declaratory relief to eliminate the pattern or  
                   practice of conduct specified in subdivision (a), whenever the Attorney General  
                   has reasonable cause to believe that a violation of subdivision (a) has occurred.

16           Recent District Court decisions have expressly held that a claim under California Civil  
 17 Code section 52.3 may be brought only by the Attorney General; not private parties. (Request  
 18 for Judicial Notice, Exhibit C, *Garcia v. City of Ceres*, 2009 WL 529886, at \* 11 (E.D. Cal.  
 19 2009) (holding the Section 52.3 “is strictly for the Attorney General . . . and there is nothing to  
 20 suggest that California Civil Code section 52.3 provides a private right of action”); Exhibit D,  
 21 *Akhtarshad v. City of Corona*, 2009 WL 362130, at \* 7 fn. 4 (C.D. Cal. 2009) (“There is no  
 22 private right of action to enforce California Civil Code section 52.3”). The statute explicitly  
 23 states that “The Attorney General may bring a civil action in the name of the people . . .  
 24 whenever the Attorney General has reasonable cause to believe that a violation of [this  
 25 provision] has occurred.” Cal. Civ. Code § 52.3(b) (emphasis added). Notably, Section 52.3

1 does not state that an individual may institute a civil action under the statute.

2 Plaintiffs may argue that *Cabral v. County of Glenn*, 624 F.Supp.2d 1184, 1193 (E.D. Cal.,  
 3 2009), is controlling and supports their contention that they have a private right of action under  
 4 Section 52.3. But that *Cabral* has no application to this action for several reasons. Although  
 5 the court in *Cabral* stated that the individual plaintiff had adequately stated a claim pursuant to  
 6 section 52.3. it erroneously referred to section 52.3 as “the Bane Act.” (*Id.* at 1193.) The Bane  
 7 Act is California Civil Code section 52.1. In contrast to Section 52.3, the Bane Act explicitly  
 8 provides a private right of action: “Any individual whose exercise or enjoyment of rights  
 9 secured by the Constitution or laws of the United States, or of the rights secured by the  
 10 Constitution or laws of this state, has been interfered with, as described in [this provision], may  
 11 institute and prosecute in his or her own name and on his or her own behalf a civil action for  
 12 damages . . . .” Cal. Civ. Code § 52.1(b) (emphasis added); *see O'Toole v. Superior Court of*  
 13 *San Diego County*, 140 Cal.App.4th 488, 501-02 (2006). The Bane Act also permits the  
 14 Attorney General or any district attorney or city attorney to bring a civil action for equitable  
 15 relief in the name of the People of the State of California in order to protect the rights specified  
 16 in the statute. Cal. Civ. Code § 52.1(a).

17 Moreover, the defendants in *Cabral* did not allege that the plaintiff was barred from  
 18 instituting a private cause of action under 52.3. *Cabral v. County of Glenn*, 624 F.Supp.2d at  
 19 1193. As such, the court did not evaluate whether there was a private right of action under  
 20 Section 52.3. Instead, the court simply concluded that “Plaintiff adequately allege[d] a pattern  
 21 or practice of conduct” such that his claim pursuant to “the Bane Act” survived defendants’  
 22 motion to dismiss. *Id.* The court failed to recognize that Section 52.3 is a statutory provision  
 23 separate from the Bane Act and it did not consider that fact as it related to private individuals’  
 24 standing to sue under Section 52.3. Accordingly, *Cabral* has no application to this matter and  
 25 should not be read to allow Plaintiffs’ claim pursuant to Section 52.3.

26 Simply put, there is no private right of action to enforce California Civil Code section  
 27 52.3; only the Attorney General may bring an enforcement action under the statute.  
 28 Accordingly, Plaintiffs’ second claim pursuant to Section 52.3 accordingly fails as a matter of

1 law and should be dismissed with prejudice.

2 V.

3 **CONCLUSION**

4 Scocca cannot establish that he suffered a constitutional deprivation because the denial of  
 5 his application to carry a concealed weapon did not substantially burden his right to keep and  
 6 bear arms. In fact, he continues to hold a license to openly carry a loaded firearm during the  
 7 course and scope of his business and under California law has the right to use a firearm in self-  
 8 defense and defense of his home. Moreover, Plaintiff Associations cannot meet the  
 9 requirements of associational standing to sue on either their own behalf or in a representative  
 10 capacity. Further, Plaintiffs are not entitled to bring a claim under California Civil Code section  
 11 52.3 because the statute does not provide a private right of action. As such, Defendants  
 12 respectfully request that the Court grant their motion to dismiss.

13 Dated: May 27, 2011

14 Respectfully submitted,

15 MIGUEL MÁRQUEZ  
 County Counsel

16 By: /S/  
 17 MELISSA R. KINIYALOCTS  
 Deputy County Counsel  
 18 Attorneys for Defendants  
 19 SHERIFF LAURIE SMITH and COUNTY  
 20 OF SANTA CLARA

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